

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

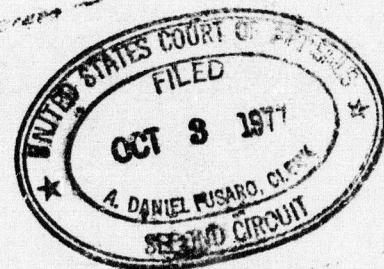
77-1225

IN THE
UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

Docket No. 77-1225

-----X
United States of America, :
 Appellee, :
 -against- :
ERROL G. O'SAVIO, :
 Appellant :
-----X

BRIEF FOR APPELLANT



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JUDGMENT BELOW

After a trial by jury before the Honorable Dudley B. Bonsal in the United States District Court for the Southern District of New York, appellant was found guilty on all thirty-four counts of an indictment charging violations of 18 U.S.C. Section 656.

QUESTIONS PRESENTED

Whether it is plain error for a trial judge to erroneously define the essential elements of the crime charged in the indictment and to define the elements of the crime charged in the indictment in such a manner as to affirm that appellant is guilty of the crime charged?

Whether it is prejudicial error for the trial judge to refuse to instruct on the credibility of the government's witnesses while unduly instructing on the credibility of appellant's character witness and the credibility of appellant's testimony?

STATEMENT OF FACTS

Appellant was employed with the National Bank of Westchester from June 1973 until March 1976. (DA-32-33). He was a teller (DA-33). On or about the day of August, 1977 appellant was charged in a thirty-four count indictment of violating Title 18, United States Code, Section 656 (DA-7).

To this indictment appellant pleaded not guilty and demanded a trial by jury. A trial of the thirty-four count indictment was held on November 9, 10, 11, 1976 before the Honorable Dudley B. Bonsal in the United States District Court for the Southern District of New York. The jury found appellant guilty on all thirty-four counts of the indictment.

The Honorable Dudley B. Bonsal gave the following instructions in pertinent parts to the jury:

1. Embezzle

...what is embezzled?
Well, embezzled here simply means that the money came into the defendant's hands unlawfully. He was a teller at the bank and this was his job, to collect these items, and that he converted the money to his own use. That is embezzled. He received the money lawfully as a teller, it was the bank's money, and he converted it to his own use (DA-9)

2. Abstract

...what does abstract mean as used in the statute? Well again all that means is that the defendant received the money as

a teller, an employee of the bank, and then he took the money away without the bank's knowledge or consent. In other words, he deprived the bank of the money. It is sort of two ways of saying the same thing, really, but the statute uses embezzled and abstract (DA-29)

3. Knowingly & Wilfully

It is impossible to prove exactly what Mr. O'Savio had in mind or what his intentions were on each of these occasions. We can't look into his mind and see what knowledge he had at the time, and determine his specific intentions, but these are matters which you, the jury, can determine from a careful consideration of the facts and circumstances which were brought out during the evidence here (DA-11)

4. Credibility

You consider whether a witness has an interest in the case. You heard a lady testify, a character witness, yesterday, Mrs. Bostic. I think you remember. She testified she was the defendant's mother-in-law for the last month or something like that. There is a family relationship and that is an interest, of course, that you might consider. Of course, that doesn't mean that any witness will mislead you because he or she has an interest, it is merely a factor for you to consider in determining the credibility of that witness. (DA-16).

Then Mr. O'Savio took the stand and he testified. Obviously, he has a very important interest in the outcome of this case and his interest, of course, is something you would consider in connection

with the credibility which
you give to his testimony,
but of course, here again
it is quite within your
province if you should so
decide to conclude that
Mr. O'Savio was telling the
complete truth despite his
interest in the outcome.
(DA-16)

No objections were made regarding the instructions on embezzlement, abstraction and intention. An instruction was made regarding the instruction on credibility. (DA-20).

SUMMARY OF ARGUMENT

The instructions on embezzlement and abstraction were erroneous. No curative instructions on these elements of 18 USC 656 were ever given to the jury. Imbedded in these erroneous instructions was the judge's opinion on appellant's guilt. The trial judge failed to instruct the jury that his opinion was his own and that the jury should be uninfluenced by it.

The instructions on credibility were one-sided. Initially, the instructions on credibility were given in general terms. The trial judge then singled out appellant and appellant's character witness as persons who had interests in the outcome of the criminal prosecution. On the other hand, the trial judge refused to give any specific instructions on the credibility of the witnesses for the government.

POINT I

THE INSTRUCTIONS OF THE TRIAL JUDGE AMOUNTED TO A PARTIAL VERDICT OF GUILTY

The right to a trial by jury in America is firmly and indelibly imbedded into our system of jurisprudence. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). The aim of permitting a criminal defendant to be tried by a jury is to insulate him from the potential "arbitrary or partial judgment of the court." Patton v. United States, 281 U.S. 276, 296 50 S. Ct. 253, 257, 74 L.Ed. 854 (1930).

The man is black, who decides one's fate, commands great respect. Scruggs v. United States, 450 F.2d 359 (8th Cir. 1971). As was aptly stated in Starr v. United States, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L.Ed. 841 (1894).

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessary and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.

At a trial by jury the power of a trial judge is limited to insuring proper conduct of the proceedings and determining questions of law. Querica v. United States, 289 U.S. 466, 53 S. Ct. 698, 77 L.Ed. 1321 (1933). And, if necessary, he must present the facts to the jury in a clear and straightforward manner. United States v. Nazzarone,

472 F.2d 302, 313 (2nd Cir. 1973). The jury however, is the trier of facts, Starr v. United States, supra.

In the instant appeal, the jury never had the opportunity to independently determine whether defendant-appellant embezzled or abstracted the bank's money. That was a foregone conclusion. In defining "embezzled" and "abstract" the trial judge assumed that the appellant had perpetrated the complained of acts and that such acts constituted "embezzled" (DA-9). The trial judge repeated the same process with the term "abstract" (DA-9). In defining "embezzled" and "abstract" the trial judge was gratuitously giving out guilty signals to the jury. United States v. Natale, 526 F.2d 1160 (2nd Cir. 1975) cert. den. 425 U.S. 950 (1976).

This issue is akin to that found in Roe v. United States, 287 F.2d 435 (5th Cir. 1961). The jury was supposed to decide whether mineral leases sold and delivered through the mails amounted to investment contracts. Instead, the trial judge instructed the jury that mineral leases were investment contracts. The court found the instruction as amounting to a partial verdict of guilt. Id at 441.

In defining the terms "embezzled" and "abstract" in such a manner as to foreclose the questions of appellant's innocence, the trial judge directed a verdict of guilt. That he was without power to do. The comment in Mims v. United States, 375 F.2d 135 (5th Cir. 1967) is especially abstract to this appeal since the questions of embezzled and abstract were material:

A trial judge has a wide latitude in commenting on the evidence during his instructions to the jury, but he has no power to direct a verdict of guilty. An instruction deciding a material fact as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty....

The trial judge's instruction for a partial verdict of guilt in the instant appeal cannot be transformed into a judge's opinion since no meaningful instruction was given to the jury warning it of its function as the sole trier of facts. United States v. Natale, 526 F.2d 1160, 1667-68 (2nd Cir. 1975); Roe v. United States, supra.

The trial judge gave the jury the distinct and enduring impression that the only issue to be decided was that of appellant's intent on each of the thirty-four occasions (DA-10-11). If the trial judge left any doubts as to where he stood when he defined "embezzled" and "abstract" he certainly drove his position home when he instructed the jury on "knowingly", "wilfully" and "unlawfully". (DA-10-11).

An instruction which persuades a jury to reach a certain conclusion is erroneous. Miller v. United States, 120 F.2d 968 (10th Cir. 1941). An erroneous instruction denies the jury of "its own function of independent determination of the facts." United States v. DeSisto, 289 F.2d 833, 835 (2nd Cir. 1961). A subsequent instruction to the jury that they are the sole triers of facts is insufficient. United States v.

Grumberger, 431 F.2d 1062 (2nd Cir. 1970). Despite the trial judge's prejudicial instructions no curative instructions were given to smother the prejudice.

It was prejudicial error for the trial judge to allow the jury to begin deliberations with the belief that the judge after hearing all the evidence had concluded that appellant was guilty. Horning v. District of Columbia, 254 U.S. 135, 41 S. Ct. 53, 65 L.Ed. 185 (1920). While a trial judge may express his opinion regarding a defendant's guilt, it should be cautiously made and made only in exceptional cases. United States v. Murdock, 290 U.S. 389, 394, 54 S. Ct. 223, 225, 78 L.Ed. 381 (1933). An expression of guilt is unwarranted when a criminal defendant enters a plea of not guilty. United States v. Natale, supra; see Davis v. United States, 227 F.2d 568 (10th Cir. 1955) (defendant denied charge on witness stand).

The appellant took the witness stand in his own behalf (DA-32). He denied any wrongdoing regarding the within indictment (DA-34). The jury and not the trial judge should have determined whether defendant was innocent or guilty. United States v. McCracken, 488 F.2d 406 (5th Cir. 1974).

The instructions here regarding "embezzled" and "abstract" were unnecessary. A term can be defined without implicating a particular person. Among other things, Webster International Dictionary 2nd Ed. defines president: A presiding officer of a governmental body...." This definition is impersonal. From such a definition a person could independently determine who James Earl Carter is. A jury has a similar

function in a criminal trial. United States v. McCracken,
supra.

It cannot be denied that the definitional instructions were too personal and too prejudicial. Any curative instruction would fall short of its aim. United States v. Grumberger, supra. "A failure to charge correctly is not harmless since the verdict might have resulted from the incorrect instruction." United Brotherhood Etc. v. United States, 330 U.S. 392, 409 (1946).

POINT II

THE INSTRUCTIONS OF THE TRIAL JUDGE WERE ERRONEOUS, MIS- LEADING AND PREJUDICIAL

Trial counsel herein failed to object when the trial judge prejudicially defined "embezzled" (DA-9) "abstract" (DA-9) and "intent" (DA 10-11). Appellant now argues that these instructions amounted to a partial verdict of guilty. Cf Mims v United States, supra (plain error). This court has authority under Rule 52 (b) of the Federal Rules of Criminal Procedure to correct plain errors.

Appellant complains of the denial of his right under the Sixth Amendment to the United States Constitution to an uninfluenced jury trial. When a federal constitutional error exists the government must demonstrate beyond a reasonable doubt that the error was harmless. Chapman v. State of California, 366 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed.2d 705 (1967). An appellate court should not concern itself with the substantiality of the evidence. See Harrington v. California, 395 U.S. 250, 895 S. Ct. 1726, 23 L.Ed.2d 284 (1969). "The question is whether there is a reasonable possibility that the (instructions) complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 86, 84 S. Ct. 229, 230, 11 L.ED2d 271 (1963).

The court's instruction regarding the definition of embezzlement was misleading. See Dixon v. United States, 295 F.2d 396 (8th Cir. 1961). First, the court states "embezzled

here simply means that the money into the defendant's hands unlawfully." (DA-9) Later, but in the same paragraph, the court states "He (appellant) received the money lawfully as a teller at the bank, it was the bank's money, and he converted it to his own use." (DA-9) The trial judge, in fact, instructed the jury to decide whether it was "Jesse James" or "Billy the Kid." The trial judge had already decided that appellant was a criminal.

To make out the crime of embezzlement the evidence must show that the property initially came into the person's hands lawfully. Waxberg v. United States, 329 F.2d (9th Cir. 1964). The evidence must then show an "unlawful and wilful purpose to retain the money of another for one's own use. Taylor v. United States, 320 F.2d 843 849 (9th Cir. 1963).

Under the above-mentioned circumstances, the trial judge's first instruction on embezzlement was erroneous in definition and prejudicial in form. The trailing instruction was correct in definition but was also prejudicial in form. The trailing instruction only improved the definition of embezzlement. The assertions of appellant's guilt in the instructions were never withdrawn. The instructions lacked words of qualification. The instructions were prejudicial, erroneous and misleading but the implications about appellant's guilt were clear.

A jury instruction must not mislead. Querica v. United States, supra. It is erroneous to give two instructions in which one of the instructions is in direct conflict with the other and where no curative instruction is given. Gonzalez v.

United States, 286 F.2d 118 (10th Cir. 1960) cert. den.
365 U.S. 878 (1961).

The Second Circuit has found reversible error when two instructions--one prejudicial and erroneous and the other correct--are given and the verdict fails to assure that no prejudice occurred. United States v. Reid, 517 F.2d 953 (2nd Cir. 1975). This position also finds support in Nicole v. United States, 72 F.2d 780, 787 (3rd Cir. 1934) where the court's comment is especially applicable to the instant appeal:

Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitute reversible error

Unlike Nicole, neither instruction in the instant appeal was correct. It is unnecessary to speculate about the jury's deliberations. Unquestionably, if the jury followed either instruction, it followed an erroneous one. This is a fitting case to apply the plain error rule. A trial by judge is not a trial by jury.

The trial judge's instruction on abstraction was also erroneous. The trial judge equated "embezzled" with "abstract" (DA-9). United States v. Breese, 131 F. 915, 921 (W.D.N.C. 1904) holds otherwise.

Abstraction...is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge

and consent, or that of its board of directors, converts them to the use of himself, or some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. (Emphasis added)

The instruction on abstraction in the instant appeal was erroneous. It amounted to no instruction. The jury was "operating almost completely in the dark". United States v. Howard, 506 F.2d 1131, 1134 (2nd Cir. 1974). (plain error)

It is groundless to argue here that the verdict gives assurance of no prejudice. United States v. Reid, supra. In this appeal each count of the indictment arose under 18 U.S.C. Section 656. It does not follow that finding appellant guilty under one count creates a statutory inference of guilt on another count. See United States v. Baratta, 397 F.2d 215 (2nd Cir. 1968) cert. den. 393 U.S. 939 (1968).

In the instant appeal the trial judge commented:

It is impossible to prove exactly what Mr. O'Savio had in mind or what his intentions were on each of the occasions. We can't look into his mind and see what knowledge he had at the time and determine his specific intentions, but these are matters which you, the jury can determine from a careful consideration of the facts and circumstances were brought out showing the evidence here (DA-10-11)

This appeal is of the same nature as United States v.

Raub, 177 F.2d 312 (7th Cir. 1949) where the criminal defendant never admitted, at trial, his guilt. Nevertheless, the trial judge directed a partial verdict of guilt when it stated:

It is a very simple question that is for you to determine, the facts are undisputed, is whether or not this was done wilfully. Id at 316

The within instruction on intent coupled with the instructions on embezzlement and abstraction left with the jury the indelible impression that the only issue to be decided was that of intent. Like Raub these instructions amounted to a partial verdict of guilt since appellant maintained his innocence at trial.

POINT III

THE INSTRUCTION ON CREDIBILITY UNNECESSARILY WATERED DOWN APPELLANT'S DEFENSE

Appellant took exception to the trial judge's failure to give a balanced instruction on credibility (R. 303). In addition to pointing out appellant's interest in the outcome of the case (which is obvious, to say the least) the trial judge took great pains to point out to the jury the interest of appellant's witness, Beatrice Bostic who testified to appellant's good reputation for truthfulness and honesty (DA-35-37). The trial judge re-called to the jury's attention appellant's relationship to Reverend Bostic's mother-in-law (DA-16).

Mrs. Robert Y. Huie and Ms. Virginia Higgins testified on behalf of the government. They both depended on the National Bank of Westchester for wages to keep bread and butter on their tables, to keep warm clothes on their backs and to keep roofs over their heads. Certainly, their "interests" were no less than that of Reverend Bostic. This is still a good saying: "He who pays the piper plays the tune."

The instruction was unbalanced. It completely watered-down, if it didn't eliminate, appellant's defense. Character evidence can be of extreme importance to a criminal defendant especially since it alone may create reasonable doubt. United States v. Minieri, 303 F.2d 550 (2nd Cir. 1962) cert. den. 371 U.S. 847 (1963).

An instruction from the court advising the jury to consider defendant's interest when evaluating defendant's testimony is acceptable to this circuit. United States v. Tolkow, 532 F.2d 853 (2nd Cir. 1976). The instruction, however, must be fair to both the government and the defendant. United States v. Bujese, 378 F.2d 719 (2nd Cir. 1967).

The test of fairness regarding a court's instruction on credibility may be found in United States v. Mahler, 363 F.2d 673, 678 (2nd Cir. 1966). A court's instruction singling out a criminal defendant's testimony may become unfair when the court fails (1) to instruct that self-interest does not necessarily cause incredible testimony (2) to instruct that witnesses for the government may also have an interest in the outcome of the case and (3) to instruct that the jury must decide which version is credible.

In the instant appeal, the trial judge refused to instruct the jury of the interest in which Mr. Huie and Mrs. Higgins had in the case (DA-22). Mr. Huie was the heart of the government's case. He gave over one hundred ten pages of direct testimony. The government practically put all of its "marbles" in one bag. It seems strange that an economic relationship between Mr. Huie and the National Bank of Westchester calls for no instructions on credibility while an indirect family relationship between appellant and Reverend Bostic calls for a robust one.

Under the Mahler formula, the instruction on credibility was unbalanced. Appellant was penalized for calling

a character witness while the government played ball untouched. Such unbalanced lines are foreign to Mahler v. United States, supra.

In the Tenth Circuit singling out the testimony of a criminal defendant who dares to tell his version of the facts is frowned upon. United States v. Bear Killer, 534 F.2d 1253 (10th Cir. 1976) accord Taylor v. United States, 390 F.2d 275, 278 (8th Cir. 1968) ("We would prefer that the defendant not be singled out. His interest is obvious to the jury").

CONCLUSION

The judgment of the district court should be reversed on all thirty-four counts and the case should be remanded for a new trial.

Dated: New York, New York

October 1977

Respectfully submitted,

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